Petition

81-1386

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1981

PACIFIC FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION, a federal savings and loan association,

Petitioner,

v.

CHARLES B. GUINASSO and ROSARIA V. GUINASSO, husband and wife,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

In a decision construing federal law and the removal jurisdiction of the federal courts, the United States Court of Appeals for the Ninth Circuit directed remand, holding that petitioner, a federally-chartered savings and loan association, was not entitled to remove a case to federal court despite its contention that respondents' claim, by virtue of federal preemption, arose under the laws of the United States as well as under an Act of Congress regulating commerce.

1. Whether federal law and regulation have preempted the field of the lending practices of federal savings and loan associations such that federal preemption asserted under the Supremacy Clause of the United States Constitution is a sufficient basis for federal jurisdiction under 28 USC §1331.

2. Whether respondents' claim is necessarily based upon the Home Owners' Loan Act of 1933 for

the purpose of federal jurisdiction under 28 USC §1337.

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Congress intended a uniform national system of federal savings and loan associations subject to comprehensive federal control. The Ninth Circuit's ruling encourages disruption of the uniformity intended by Congress by denying a federal forum to such associations when the validity of their federally regulated lending practices is challenged.

Definition of the relationship between federal law and state law in a field as comprehensively regulated as that of federal savings and loan associations is a matter of urgent public concern.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

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Petitioner,

v.

CHARLES B. GUINASSO and ROSARIA V. GUINASSO, husband and wife,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit has been reported at

656 F2d 1364. A copy is attached as Appendix A.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit is dated September 21, 1981. Petitioner's petition for rehearing, and suggestion for rehearing in banc, was denied on November 19, 1981. Appendix B. Petitioner's motion for stay of mandate was granted on December 7, 1981.

Jurisdiction to review the judgment of the United States Court of Appeals for the Ninth Circuit by writ of certiorari is conferred on this Court by 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The constitutional provision involved is Article VI, the Supremacy Clause. It is printed in Appendix H.

The statute involved is Ch. 64, §5(a), 48 Stat.

132, 12 U.S.C. §1464(a). It is printed in Appendix I.

The following regulations are involved, and are printed at Appendix F:

12 CFR 545.611

12 CFR 541.5

12 CFR 544.1(b)(10)

STATEMENT OF THE CASE

This is an action for interest or income on reserve accounts brought by plaintiffs-respondents, husband and wife, against defendant-petitioner, a federally chartered savings and loan association. The complaint, Appendix C, originally filed in the Circuit Court of the State of Oregon in 1975, alleged breach of an express trust, breach of contract, and unjust enrichment in that petitioner did not pay interest or income on reserve funds received from respondents for the anticipated costs of real estate taxes, insurance premiums, and assessments on real prop-

erty in which defendant had a security interest. Respondents allegedly brought this action on their own behalf and on behalf of all others similarly situated. No class has been certified.

Petitioner timely removed this action to the United States District Court for the District of Oregon asserting original federal jurisdiction in that this is an action arising under the laws of the United States, including federal regulation.

Further proceedings were deferred pending consideration of a similar case. In 1979, following decision in that case, respondents in the present case moved for remand to the state court.

The district court denied the motion to remand finding that the case arose under federal law and that there was federal jurisdiction under 28 USC §1337. Appendix E. Thereafter, the district judge certified the case for interlocutory appeal, and the United States Court of Appeals for the Ninth Circuit granted

respondents' petition for leave to appeal, subsequently reversing the district court.

The facts material to consideration of the questions presented are from respondents' complaint, Appendix C, and the applicable federal regulations governing petitioner, Appendix F.

Petitioner, as a federal savings and loan association is chartered by the Federal Home Loan Bank Board, an independent agency of the United States, 12 USC §1437(b), under the Home Owners' Loan Act of 1933, 12 USC §§1461 et seq., as amended. Section 5(a) of the Act provides:

> In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as 'Federal Savings and Loan Associations', and to issue charters therefor, giving primary consideration to the best practices of local mutual

> thrift and home-financing institutions in the United States. 12 USC §1464(a).

The Board's general regulations describe its authority in broad terms:

> . . . the Board issues charters for the associations, is responsible for their examination and supervision, and prescribes regulations governing their operations. . . . 32 F.R. 9041, June 24, 1967; see also 12 C.F.R. §500.3.

Those functions are carried out under comprehensive regulations. The lending practices of federal associations are regulated under 12 C.F.R. §545.6, which contains rules covering all aspects of their real estate loans. That regulation has authorized and regulated the use of tax and insurance reserve accounts by federal associations for many years. As amended in 1958, §545.6-1 required that mortgages of federal associations protect the lender with respect to insurance premiums, real estate taxes and other security risks, and allowed the

association to

> . . . require that the equivalent of one-twelfth of the estimated annual taxes, assessments, insurance premiums, and other charges on real estate security, or any of them, be paid in advance to such association in addition to interest and principal payments on its loans, to enable the association to pay such charges as they become due from the funds so received.

Other federal regulations governing petitioner and applicable to respondents' claim include 12 C.F.R. 541.5 and 544.1(b)(10). Appendix F.

REASONS FOR ALLOWING THE WRIT

The United States Court of Appeals for the Ninth Circuit has decided an important question of federal law not heretofore determined by this Court, and has done so in a manner inconsistent with the reasoning of this Court's decisions as well as decisions of the Second and Tenth Circuit Courts of Appeals.

Congress intended a uniform national system of federal savings and loan associations subject to

comprehensive federal control. The Ninth Circuit's ruling encourages disruption of the uniformity intended by Congress by denying a federal forum to such associations when the validity of their federally regulated lending practices is challenged.

Definition of the relationship between federal law and state law in a field as comprehensively regulated as that of federal savings and loan associations is a matter of urgent public concern.

ARGUMENT

A claim in an area exclusively governed by federal law arises under the laws of the United States for the purpose of federal jurisdiction under 28 USC §1331.

The Ninth Circuit denied this important proposition of federal law in spite of express Congressional intent and the scope of regulation of the lending practices of federal savings and loan associations.

In 1932, Congress enacted the Federal Home

Loan Bank Act, 12 USC §1421 et seq., for the express purpose of making available to the public a reserve of capital for home financing. In 1933, as home financing continued to be affected by the Depression, Congress passed the Home Owners' Loan Act. This latter Act conferred on the Federal Home Loan Bank Board, created by the 1932 Act, the authority to prescribe regulations "to provide for the organization, incorporation, examination, operation and regulation of associations to be known as 'Federal Savings and Loan Associations,' and to issue charters therefor." 12 USC §1464(a).

Rather than provide for the chartering of individual associations under state law subject to regulation by state agencies and following the practices and procedures of the state in which they are located, Congress instead provided that federal savings and loan associations would be chartered by, and derive their power from, the federal government.

Federal associations were to be exclusively regulated "under such rules and regulation as [the Bank Board] may prescribe." The Bank Board, in discharging its duty, was explicitly instructed by Congress to be guided, not by the isolated practices of any particular state, but by "the best practices of local mutual thrift and home financing institutions of the United States." 12 USC §1464(a).

The explicit statutory provisions respecting federal associations are inconsistent with the holding of the Court of Appeals for the Ninth Circuit. The Ninth Circuit would deny a federal forum to a federal association whose federally regulated lending practices are challenged in state law terms. This creates the possibility that a unique burden could be imposed on federal associations in each individual state, depending on the differences existing in local common law and statutes among the states. Such a result challenges the congressional purpose of the Home

Owners' Loan Act and interferes with its execution by exposing federal associations in the fifty states to fifty different regulators. The Bank Board will no longer be the exclusive agency for supervision of federal associations.

The federal interest in maintaining a viable system of federal savings and loan associations is so strong that issues addressed to the core of that system -- its lending practices -- should be resolved on the basis of uniform judge-made federal law rather than on the basis of varying state laws. In creating the federal savings and loan system, Congress intended to implement a national policy of federal leadership in home financing. H.R. Doc. No. 19, 73rd Cong., 1st Sess. 1618, 1702 (1933). A policy of uniform federal regulation, unfettered by varying state law, was indispensable to achieving the Congressional objective of a comprehensive response to the inadequacies of the state savings systems. Conf. of Federal

Savings & Loan Ass'ns v. Stein, 604 F2d 1256, 1257 (9 Cir. 1979), aff'd mem. 445 US 921 (1980).

In further recognition of Congress' comprehensive regulatory scheme, the court held in Conf. of Federal Savings & Loan Ass'ns v. Stein that the law applicable to federal savings and loans is federal law, and stated:

> Pursuant to its authority, the Bank Board has promulgated regulations comprehensively dealing with the creation and operation of federal savings and loan associations.
>
> * * * * *
>
> In our judgment the regulatory control of the Bank Board over federal savings and loan associations is so pervasive as to leave no room for state regulatory control.
>
> The broad regulatory authority over the federal associations conferred upon the Bank Board by HOLA does wholly preempt the field of regulatory control over these associations. If state-conferred rights are to be enforced against the federal associations by any regulatory body (a question we do not reach), enforcement must be by the Bank Board.

604 F2d 1256 at 1258, 1260 (9 Cir. 1979), aff'd mem. 445 US 921 (1980) (emphasis added).

The question left open by Conf. of Federal Savings and Loan Ass'ns v. Stein is whether there is "room" for state common law control of the lending practices of federal savings and loan associations.

In addition to federal statutes and regulations, any common law to be applied to respondents' claim against petitioner is federal, rather than state, common law. Murphy v. Colonial Federal Savings and Loan Ass'n, 388 F2d 609 (2 Cir. 1967). The federal interest in the lending practices of federal savings and loan associations is so strong and the legislation regulating federal associations so comprehensive, see 12 USC §1464, that the federal common law must be the source for any tort or contract remedy against such an association. See Textile Workers Union v. Lincoln Mills, 353 US 448 (1957).

In holding that the district court lacked juris-

diction over this case, the Court below failed to recognize the supremacy of federal common law and its application as a basis for federal jurisdiction. Federal common law will support jurisdiction under 28 USC §1331. Illinois v. Milwaukie, 406 US 91, 98-101 (1972).

The Ninth Circuit's decision is inconsistent with decisions of other courts which hold that where a court must necessarily look to federal law in passing on a claim, that claim is removable.

The Ninth Circuit ignores the true nature and basis of respondents' claim when it finds, "The state claim asserted here contains no federal ingredient." 656 F2d at 1367. As noted in Milberg v. Lawrence Cedarhurst Federal Savings & Loan Ass'n, 496 F2d 523 (2 Cir. 1974), the very fact of petitioner's federal charter, alleged in the complaint, presents the necessary federal ingredient. Furthermore, respondents' claim, although couched in state law jargon, is

directed at the lending practices of petitioner specifically regulated by federal regulation.

Whether respondents' claim is federal in nature, and thus gives rise to federal jurisdiction, must be determined by taking into consideration all applicable statutes, regulations and case law. North Davis Bank v. First National Bank, 457 F2d 820, 823 (10 Cir. 1972). No matter whether plead as a state law claim or not, if the court which will decide the merits of respondents' claim must necessarily look to federal law in passing on that claim, there is federal jurisdiction and the case is removable. Johnson v. England, 356 F2d 44 (9 Cir. 1966), cert. denied 384 US 961 (1966); Rettig v. Arlington Heights Federal Savings & Loan Ass'n, 405 F.Supp 819 (N.D. Ill. 1975); 14 Wright & Miller, Federal Practice and Procedure, §3772, pp. 567-69 (1976). "In a case of preemption, then, federal law, by definition, provides the only basis for the plaintiff to gain the re-

lief it seeks, meaning that any time a court finds preemption it should conclude that the action arises under federal law." Billy Jack v. New York Coat, Suit, etc., 511 F.Supp. 1180 (S.D.N.Y. 1981).

A court must necessarily look to federal law to determine respondents' rights with respect to petitioner, and petitioner's duties with respect to respondents. In enacting the Home Owners' Loan Act of 1933 and granting plenary regulatory authority to the Bank Board, Congress so occupied the field of control over federal savings and loan associations that any duty on the part of petitioner can only be imposed by reason of a federal statute, regulation, or common law. Murphy v. Colonial Federal Savings and Loan Ass'n, 388 F2d 609, 612 (2 Cir., 1967). Respondents' claim, therefore, is necessarily grounded on federal statutes and regulations.

Contrary to the narrow view of the preemption doctrine taken by respondents and the Ninth Circuit,

petitioner did not assert federal preemption as a defense, but rather to determine the body of substantive law which governs this dispute. Billy Jack v. New York Coat, Suit, Etc., 511 F.Supp. 1180 (S.D.N.Y. 1981). By labelling preemption as a "defense", the Ninth Circuit ignores federal preemption as a basis for federal jurisdiction. A case presenting a state law claim may "'arise under' a law of the United States if the complaint discloses a need for determining the meaning or application of such a law." T.B. Harms Co. v. Eliscu, 399 F2d 823, 827 (2 Cir. 1964), citing Smith v. Kansas City Title and Trust Co., 255 US 180 (1921).

Although respondents may plead their complaint around a federal cause of action, if the claim is exclusively governed by federal law due to preemption, and if the court necessarily must look to federal law in passing on the claim, the case is removable. Johnson v. England, 356 F2d 44 (9 Cir., 1966),

cert. denied 384 U.S. 961 (1966); Rettig v. Arlington Heights Federal Savings & Loan Ass'n, 405 F.Supp. 819 (N.D. Ill. 1975).

The Ninth Circuit's decision is inconsistent with decisions of the Second Circuit which find federal jurisdiction based on 28 USC §1337.

The United States Court of Appeals for the Second Circuit has held the Home Owners' Loan Act of 1933 to be "an Act of Congress regulating commerce" for the purposes of federal jurisdiction under 28 USC §1337. Appendix G. Milberg v. Lawrence Cedarhurst Federal Savings & Loan Ass'n, 496 F2d 523 (2 Cir. 1974); Murphy v. Colonial National Bank & Trust Co., 388 F2d 609, 615 (2 Cir. 1962). In both the cited cases, plaintiffs' allegations concerned conduct which was the subject of federal regulations issued pursuant to the Home Owners' Loan Act of 1933. In Milberg v. Lawrence Cedarhurst Federal Savings & Loan Ass'n, 496 F2d 523 (2 Cir. 1974),

plaintiff's claim was premised on the same regulation respecting reserve accounts that is at issue in this case. The court found federal jurisdiction in both cases under 28 USC §1337.

The Court of Appeals for the Ninth Circuit, however, after noting that the district court correctly considered the applicability of 28 USC §1337, 656 F2d at 1365, n. 3, found, contrary to the Second Circuit, that the suit was not within the terms of 28 USC §1337.

The Home Owners' Loan Act of 1933, and the regulations promulgated thereunder, are determinative of the parties' rights and duties in this action. The federal law respecting petitioner's lending practices is comprehensive and exclusive. The arguments supporting jurisdiction under 28 USC §1331 are equally applicable to 28 USC §1337. Since the court must necessarily look to the federal law, commencing with the Home Owners' Loan Act and proceeding to the

regulations issued thereunder, in passing on respondents' claim, the case arises under that Act.

CONCLUSION

The relationship between federal law and state law with respect to federal savings and loan associations needs further definition. Compare Conf. of Federal Savings & Loan Ass'ns v. Stein, 495 F.Supp. 12 (E.D. Ca. 1979) rev. mem. (9 Cir., September 23, 1981), with Smart v. First Federal Savings & Loan Ass'n, 500 F.Supp. 1147 (E.D. Mich. 1980) and Panko v. Pan American Federal Savings & Loan Ass'n, 119 Cal.App. 3d 916, 174 Cal. Rptr. 240 (1981). This case presents an opportunity to define this relationship in a jurisdictional setting unencumbered by collateral issues.

The petition for writ of certiorari should be granted.

Respectfully,

WOOD, TATUM, MOSSER, BROOKE
& HOLDEN

By /S/ PETER G. VOORHIES
Peter G. Voorhies
Of Counsel for Petitioner

Appendix

APPENDIX A

Charles B. GUINASSO and Rosario V. Guinasso, husband and wife, Plaintiffs-Appellants,

v.

PACIFIC FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION, a federal savings and loan association, Defendant-Appellee.

No. 80-3099

United States Court of Appeals, Ninth Circuit

Argued and Submitted July 16, 1981. Decided Sept. 21, 1981.

Appeal from the United States District Court for the District of Oregon

Before WRIGHT, CHOY and FERGUSON, Circuit Judges.

WRIGHT, Circuit Judge:

INTRODUCTION

The Guinassos assumed a home loan financed by Pacific First Federal Savings and Loan Assoc-

iation.[1] Pursuant to a regulation promulgated by the Federal Home Loan Bank Board, 12 C.F.R. §545.6-11 (1975), Pacific created escrow accounts with funds collected from mortgagors for taxes and insurance. When the Guinassos' deed of trust was executed, the regulation did not state whether associations were required to pay interest on such accounts.[2] Pacific paid none.

This suit is a class action by the Guinassos for

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1. Pacific is a federally-chartered savings and loan association under the Home Owners Loan Act, 12 U.S.C. §1461 et seq.

2. The regulation was later amended to provide that relevant state laws would determine whether interest was required. See 12 C.F.R. §545.6-11 (c) (1975). This suit concerns mortgages obtained prior to the amendment.

themselves and others similarly situated to recover interest on the funds held in escrow. The complaint was for breach of contract, violation of duties as a trustee, and unjust enrichment. It was filed in state court and phrased wholly in terms of state law. It presented a recognized cause of action under the common law of Oregon. See Derenco, Inc. v. Benjamin Franklin Federal Savings & Loan Ass'n, 281 Or. 533, 577 P.2d 477, 491, cert. denied, 439 U.S. 1051, 99 S.Ct. 733, 58 L.Ed.2d 712 (1978).

Pacific removed the action to federal district court, arguing that federal law preempted the Oregon claim. The district court held that it had jurisdiction under 28 U.S.C. §1337,[3] and it agreed that the state

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3. Section 1337, 28 U.S.C., confers jurisdiction on suits arising under an act of Congress regulating commerce, without regard to amount in contro-

versy.

The defendants asserted jurisdiction under 28 U.S.C. §§1331 (arising under federal law) and 1332 (diversity of citizenship). The district court did not rely on these provisions, apparently concluding that the requirement of more than $10,000 in controversy was not met.

The amount-in-controvery requirement for §1331 jurisdiction was subsequently repealed and is no longer in effect. See Act of December 1, 1980, P.L. 96-486, 94 Stat. 2369; id. at 2370 (repeal applies to all pending civil actions).

In any event, the district court correctly considered the applicability of §1337. Preemption was asserted on the basis of the Home Owners' Loan Act and regulations adopted pursuant thereto. HOLA is an act "regulating commerce" within §1337. See Milberg v. Lawrence Cedarhurst Federal Savings & Loan Ass'n, 496 F.2d 523, 525 (2d Cir. 1974).

claim was preempted. After denying the plaintiffs' motion to remand, it certified the case for interlocutory appeal under 28 U.S.C. §1292(b). We granted leave to appeal.

REMOVAL JURISDICTION

[1] A suit can be removed to federal court under 28 U.S.C. §1441(a) only if it could have been brought there originally. Snow v. Ford Motor Co., 561 F.2d 787, 789 (9th Cir. 1977). This suit could have been brought in federal court if it arose under federal law, or under an act of Congress regulating commerce. See note 3 supra.

[2] A suit arises under federal law within 28 U.S.C. §1331 if the complaint, properly pleaded, presents a substantial dispute over the effect of federal law and the result turns on the federal question. See Spokane Legal Services, Inc. v. Legal Services Corp., 614 F.2d 662, 667 (9th

Cir. 1980); Standage Ventures, Inc. v. Arizona, 499 F.2d 248, 249 (9th Cir. 1974).

[3] Similarly, a suit arises under an act of Congress regulating commerce within 28 U.S.C. §1337 if it seeks relief granted or implied by the act or "hinges on" the act's interpretation. Garrett v. Time-D.C., Inc., 502 F.2d 627, 629 (9th Cir. 1974), cert. denied, 421 U.S. 913, 95 S.Ct. 1569, 43 L.Ed.2d 778 (1975).

[4] A substantial proposition of federal law must form "a direct and essential element of the plaintiff's cause of action." Smith v. Grimm, 534 F.2d 1346, 1350 (9th Cir.), cert. denied, 429 U.S. 980, 97 S.Ct. 493, 50 L.Ed.2d 589 (1976).[4]

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4. Under 28 U.S.C. §1331, these propositions may be drawn from federal common law. Illinois v. Milwaukee, 406 U.S. 91, 98-101, 92 S.Ct. 1385,

APPENDIX A

Jurisdiction may not rest on propositions that merely anticipate a federal defense. United Air Lines v. Division of Industrial Safety, 633 F.2d 814, 816 (9th Cir. 1980).

[5] Federal preemption is ordinarily a matter to be raised in defense. See Gully v. First Nat'l Bank, 299 U.S. 109, 116, 57 S.Ct. 96, 99, 81 L.Ed 70 (1936). Taken alone, it is not a basis for removal. Washington v. American League of Professional Baseball Clubs, 460 F.2d 654, 660 (9th Cir. 1972).

[6] These principles indicate that the district court lacked jurisdiction.

1390-91, 31 L.Ed.2d 712 (1972). Under 28 U.S.C. §1337, they must pertain to the statute regulating commerce. Garrett v. Time-D.C., Inc., 502 F.2d 627, 630 (9th Cir. 1974), cert. denied, 421 U.S. 913, 95 S.Ct. 1569, 43 L.Ed.2d 778 (1975).

APPENDIX A

Pacific maintains that jurisdiction is proper under Meyers v. Beverly Hills Federal Savings & Loan Ass'n, 499 F.2d 1145 (9th Cir. 1974). In Meyers, the plaintiffs sought to have declared invalid under California law prepayment penalties that were imposed by federal savings and loan associations. Id. at 1145-46. The suit was brought in state court and removed to federal court. Id. Affirming the district court, we held that Congress had preempted state regulation of prepayment penalties imposed by federal associations. Id. at 1147.

We described the case's procedural history but did not comment on the propriety of removal. See id. at 1146-47. Pacific contends that Meyers implicitly authorizes removal of all preempted claims against federal savings and loan associations. Because the jurisdictional issue was not explicitly decided and the First Circuit has reached a contrary

result, we are not bound by such an implication.[5]

Pacific also relies on Johnson v. England, 356 F.2d 44 (9th Cir.), cert. denied, 384 U.S. 961, 86 S.Ct. 1587, 16 L.Ed.2d 673 (1966). The complaint in Johnson invoked state law in a labor dispute. Id. at 45. We found removal proper because §301 of the Labor Management Relations Act "operated to preempt this field of law." Id. at 48. "[A] fair construction of the complaint . . . must be that it is necessarily one pursuant to §301(a) . . ." Id.

Pacific's reliance on Johnson is misplaced.

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5. Although it recently remarked that Meyers "ruled" in favor of removal, First Federal Savings & Loan Ass'n v. Greenwald, 591 F.2d 417, 423 (1st Cir. 1979), the First Circuit did not adopt this supposed ruling. See id. at 422 (finding jurisdiction on another ground).

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Johnson merely applied Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957), in which the Supreme Court held that federal common law developed by the federal courts governs the entire subject matter of §301(a). Id. at 456, 77 S.Ct. at 917.

"[T]his interpretation . . . obviates any jurisdictional problem, since federal law then provides both the right and the remedy, and the case is one of true federal question jurisdiction." Johnson v. England, 356 F.2d at 48 n.3 (quoting C. Wright, Federal Courts §20 at 58 (1963)). In contrast, federal law provides neither the right asserted nor the remedy sought by the present plaintiffs.[6]

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6. The plaintiffs do not assert, nor are they so required, that federal law gives them an implied right of action. Cf. Milberg v. Lawrence

APPENDIX A

Pacific contends that, because the plaintiffs invoke state rights that conflict with the association's asserted federal right to pay no interest, their claim does implicitly rely on a key proposition of federal law.

[7-9] Removal may be appropriate when federal law not only displaces state law but also confers a federal remedy on the plaintiffs or compels them to rely, explicitly or implicitly, on

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Cedarhurst Federal Savings & Loan Ass'n, 496 F.2d 523, 524-25 (2d Cir. 1974) (implied right of action to challenge excessive escrow requirement in violation of federal regulation).

federal propositions.[7] But when the claim presents a prima-facie basis for relief entirely under state

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7. A suit may arise under federal law, even though a federal remedy is not sought, if the plaintiff's claim relies substantially on propositions that define federal rights, duties, or relationships. See Stone v. Stone, 632 F.2d 740, 744 & n.2 (9th Cir. 1980) (Wright, J. specially concurring); Spokane County Legal Services, Inc. v. Legal Services Corp., 614 F.2d 662, 667 (9th Cir. 1980); North American Phillips Corp. v. Emery Air Freight Corp., 579 F.2d 229, 233 (2d Cir. 1979).

In Stone v. Stone, for example, federal law governed transfer of pension benefits. 632 F.2d at 744 (Wright, J., specially concurring). The plaintiff was required to show that the benefits she claimed had been validly transferred under

APPENDIX A

law, the preemption defense does not support federal jurisdiction.[8]

---

federal law to show that she was entitled to them under state law. Id. at 744-45. The federal prerequisite to the state right supported federal jurisdiction. See id.

8. Even under expansive definitions of "arising under," a proposition of federal law must be part of the logical structure of the plaintiff's claim. See Note, The Outer Limits of "Arising Under," 54 N.Y.U.L.Rev. 978, 1004 (1979).

This requirement may be traced to Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 6 L.Ed. 204 (1824), in which Chief Justice Marshall "derived from the 'case or controversy' requirement underlying all jurisdiction an emphasis on the assertion of rights through which the

APPENDIX A

judicial power is originally invoked." 54 N.Y.U.L.Rev. at 986 (footnote omitted). Although other aspects of Osborn's holding have been abandoned, this emphasis persists. See id. at 1004.

"[F]ederal law must be invoked--by someone--to activate the federal judicial power." Id. at 986 n.57. When the suit "arises" for jurisdictional purposes, only the plaintiff's claim is before the court. Id. at 986. The test for original arising-under jurisdiction therefore focuses exclusively on the plaintiff's claim. Id. This test has been statutorily extended to removal jurisdiction by 28 U.S.C. §1441(a).

APPENDIX A

The state claim asserted here contains no federal ingredient. Even if federal law authorized Pacific's failure to pay interest, it did not prescribe the plaintiffs' remedy or establish conditions for recovery under state law.[9] At most it foreclosed state regulation, in which case it would be a complete defense to the plaintiffs' claim, but still only a defense.

Because the suit did not arise under federal law or an act of Congress regulating commerce, we

---

9. In addition to invoking 12 C.F.R. §545.6-11 (1975), Pacific maintains that 12 C.F.R. §§541.5 and 544.1 (1975) authorized it to pay no interest on the escrow accounts because they were "short-term savings accounts" on which the payment of interest was not required. All of these arguments present federal defenses.

need not consider the preemption question further.[10] The district court lacked jurisdiction. Its judgment is reversed and remanded and the district judge will remand to the Oregon courts.

REVERSED and REMANDED.

---

10. Pacific also directs our attention to Conference of Federal Savings & Loan Ass'ns v. Stein, 604 F.2d 1256 (9th Cir. 1979), aff'd mem., 445 U.S. 921, 100 S.Ct. 1304, 63 L.Ed.2d 754 (1980). It is inapposite.

A number of savings and loan associations brought an action in federal court for declaratory relief to prevent a state official from enforcing a state regulation in an area of exclusive federal regulation. Id. at 1257. The plaintiffs sought to protect a federal right against actual and threatened interference. Id.

APPENDIX A

We determined that the plaintiffs' claim was more than a possible defense to potential state claims and held that the suit presented a justifiable controversy arising under federal law. Id. at 1259.

The present case is quite different. These plaintiffs do not rely on federal law.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES B. GUINASSO and ROSARIA V. GUINASSO, husband and wife,	)	
	)	No. 80-3099
Plaintiffs-Appellants,	)	
vs.	)	
PACIFIC FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION, a federal savings and loan association,	)	ORDER
Defendant-Appellee.	)	

Before: WRIGHT, CHOY and FERGUSON, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing, and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge

of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

[Filed November 19, 1981.]

APPENDIX C

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

CHARLES B. GUINASSO and ROSARIA V. GUINASSO, husband and wife,	)	
Plaintiffs,	)	No. 416 583
vs.	)	CLASS ACTION COMPLAINT TO
PACIFIC FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION, a federal savings and loan association,	)	RECOVER UNPAID INTEREST
Defendant.	)	

Plaintiffs file this complaint on behalf of themselves and others similarly situated and allege as follows:

I

At all times material, plaintiffs are and were citizens of the state of Oregon, residing in Multnomah County.

APPENDIX C

II

At all times material, defendant is and was chartered as a Federal Savings and Loan Association with its principal place of business located in Tacoma, Washington, and engaged in the savings and loan business in the state of Oregon.

III

Plaintiffs are borrowers of money from defendant, who have been required under the terms of their real property security instrument to make advance payments to defendant for the purpose of creating a reserve fund to cover anticipated costs of real estate taxes, insurance premiums, and assessments. Such payments are hereinafter referred to as "advance reserve payments." A copy of such real property security instrument is attached marked as Exhibit A and by this reference incorporated.

APPENDIX C
IV

Plaintiffs bring this action on their own behalf and on behalf of all corporations and individuals who during the applicable statute of limitations had similar real property security instruments whose legal effect is to impose a duty on defendant to pay or credit to class members the interest or income on advance reserve payments. This is an appropriate action for the maintenance of a class action under ORS 13.220(2)(c) in that:

1. The class is so numerous that joinder of all members is impracticable. Defendant has detailed records and accounts showing the identity of each class member.

2. There are questions of law and fact common to the class.

3. Plaintiffs' claim is typical of the claims of the class.

4. Plaintiffs will fairly and adequately

protect the interests of the class.

5. Plaintiffs have complied with the prelitigation notice provisions of ORS 13.280. A copy of such notice is attached marked as Exhibit B and by this reference incorporated.

6. Questions of law and fact common to the members of the class predominate over any questions affecting only individual members.

7. The class action is superior to other available methods for the fair and efficient adjudication of this controversy.

V

The following allegations give rise to questions of law common to the class:

1. Defendant has breached its duty as trustee of an express trust by failing to pay or credit to class members the interest or income

on advance reserve payments.

2. Defendant has breached its duty under its contract by failing to pay or credit to class members the interest or income on advance reserve payments.

3. Defendant has been unjustly enriched by failing to pay or credit to class members the interest or income on advance reserve payments.

VI

The following allegations give rise to questions of fact common to the class:

1. Each class member borrowed from defendant pursuant to a real property security instrument containing the following or similar provision but having the same legal effect:

> "He will pay when due, all insurance premiums, taxes, assessments and other public charges levied, assessed or charged

APPENDIX C

against the within described property.

> "He will pay to the beneficiary, on the dates installments of principal and interest are payable, an amount, as estimated by the beneficiary, equal to 1/12th of the yearly charges, above referred to, next to become due."

2. In each instance the real property security instrument does not provide for the waiver of interest or income on advance reserve payments.

3. Each class member has made advance reserve payments to defendant.

4. Defendant has detailed records and accounts showing the amount of advance reserve payments made by each class member.

5. In each instance defendant kept for its own benefit the interest or income on the advance reserve payments.

6. In each instance defendant has failed to pay or credit to class members the

interest or income on advance reserve payments.

7. Each class member has been deprived of the benefit of the interest or income on advance reserve payments.

VII

Plaintiffs and class members are entitled to recover damages from defendant equal to the greater of the following amounts:

1. The actual income earned by defendant on advance reserve payments, and not less than

2. Interest on advance reserve payments at a rate of not less than 6 per cent per annum and compounded annually.

VIII

Plaintiffs and class members are entitled to reasonable attorney fees.

APPENDIX C

WHEREFORE, plaintiffs on behalf of themselves and others similarly situated pray for JUDGMENT against defendant as follows:

1. The greater of the following amounts:

(a) The actual income earned by defendant on advance reserve payments.

(b) Interest on advance reserve payments at a rate of not less than 6 per cent per annum and compounded annually.

2. Reasonable attorney fees.

3. Costs and disbursements.

/s/ Henry A. Carey
Henry A. Carey
of Attorneys for Plaintiffs

(Exhibits A and B have not been reprinted in this Petition)

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

CHARLES B. GUINASSO AND ROSARIA V. GUINASSO, husband and wife,	)	No. 75-538
Plaintiff,	)	FINDINGS AND RECOMMENDATION
vs.	)	
PACIFIC FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION, a federal savings and loan association,	)	
Defendant.	)	

In this civil action, plaintiffs seek to recover unpaid interest from defendant. This action was originally filed in the Circuit Court of the State of Oregon for the County of Multnomah and was subsequently removed to this court.

This action is before the court on plaintiffs' motion to remand. Plaintiff contends that there is no federal question presented in this case and that the

APPENDIX D

amount in controversy, exclusive of interest and costs, does not exceed $10,000.00. Defendant opposes the motion.

28 USC §1441 (a) permits any civil action brought in a state court of which the district courts of the United States have original jurisdiction to be removed by the defendant to the district court embracing the place where the action is pending. 28 USC §1441 (c) provides that the district court shall remand a case that was removed improvidently and without jurisdiction. In such instances, the district court may order the payment of costs.

The defendant always has the burden of establishing that removal is proper. Wright and Miller, 14 Federal Practice and Procedure § 3721, 3739 (1976) (Wright and Miller). It is the duty of this court to examine the substantive under-

pinning of the plaintiff's claim as they stand at the time the petition for removal is filed. Id. § 3721.

After carefully considering the arguments of the parties, I find that this court has jurisdiction over this case.

The general rule is that the federal controversy must be disclosed upon the face of the complaint unaided by the answer or by the petition for removal. Gully vs. First National Bank, 299 U.S. 109, 113 (1936). However, a court may resort to the petition for removal to inform itself as to the status of the defendant and the character of the activity which is the subject matter of the action. Wright and Miller § 3722. Artful pleading by plaintiff will not close off defendant's right to a federal forum. Avco Corp. vs. Aero Lodge 735,

376 F.2d 337 (6th Cir., 1967), aff'd., 390 U.S. 557 (1968). Courts will seek to determine the real nature of plaintiffs' claim, Burgess vs. Charlottesville Savs. & Loan Ass'n., 477 F.2d 40 (4th Cir., 1973), despite plaintiffs' characterization. Wright and Miller § 3722.

Although plaintiffs' claims are allegedly based on common law principals, the adjudication of these claims necessarily depend on the application of federal law.[1] Gully, supra., 299 U.S. at 112-13. Meyers vs. Beverly Hills Savings and Loan Ass'n., 499 F.2d 1145 (9th Cir., 1974); People, etc. vs. Coast Federal Sav. & Loan Ass'n., 98 F.Supp. 311, 316 (S.D. Cal., 1951). Plaintiffs' claim will be supported under one construction of the federal law and defeated under another. T.B. Harms Co. vs. Eliscu, 339 F.2d 823 (2nd Cir., 1964); Elwert vs.

APPENDIX D

Pacific First Federal Savings and Loan Ass'n., 138 F.Supp. 395 (D. Or., 1956); Rettig vs. Arlington Heights Federal Savings and Loan Ass'n., 405 F.Supp. 810 (N.D. Ill., 1975).

Plaintiffs contend that Derenco vs. Benj. Franklin Fed. Sav. and Loan Ass'n., 281 Or. 553, 548-49, 577 P.2d 477 (1978), a case involving similar issues to this case, held that federal law did not preempt the application of common law principals. This may be true, but it is federal law and not state law which determines whether the elements of removal jurisdiction have been satisfied. Shamrock Oil & Gas Corp. vs. Sheets, 313 U.S. 100, 104 (1941); Wright and Miller § 3721.

Accordingly, plaintiffs' motion to

APPENDIX D

remand should be denied.

DATED this _____ day of _____, 1979.

/s/ George E. Juba
UNITED STATES MAGISTRATE

[Filed June 8, 1979]

APPENDIX D

FOOTNOTES

[1]See e.g., 12 CFR §545.6-11(c) provides:

> A Federal association which makes a loan on or after June 16, 1975, on the security of a single-family dwelling occupied or to be occupied by the borrower . . . shall pay interest on any escrow account (1) if there is in effect a specific statutory provision or provisions of the State in which such dwelling is located by or under which state-chartered savings and loan associations, mutual savings banks and similar institutions are generally required to pay interest on such escrow accounts, and (2) at not less than the rate required to be paid by such state-chartered institutions but not to exceed the rate being paid by the Federal association in its regular accounts . . . Except as provided by contract, a Federal association shall have no obligation to pay interest on escrow accounts apart from the duties imposed by this paragraph.

The First Circuit in First Federal Sav. & Loan Ass'n. vs. Greenwald, No. 78-1155 (1st Cir., Feb. 5, 1979), held that 12 CFR §545.6-11(c) preempted a Massachusetts statute which imposed greater interest requirements.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

CHARLES B. GUINASSO and ROSARIA V. GUINASSO, husband and wife,	)	No. 75-538
Plaintiff,	)	OPINION
vs.	)	
PACIFIC FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION, a federal savings and loan association,	)	
Defendant.	)	

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SOLOMON, Judge:

Plaintiffs seek to review the magistrate's findings and recommendation

APPENDIX E

denying plaintiffs' motion to remand.

Plaintiffs are borrowers on real estate loans from Pacific First Federal Savings and Loan Association (Pacific). Under their agreements with Pacific, plaintiffs were required to make advance payments into reserve accounts to cover future real estate taxes, insurance premiums and assessments. Plaintiffs filed a class action in the state court for the interest they assert they earned but were not paid on the funds paid into the reserve accounts. The complaint alleged breach of trust, breach of contract, and unjust enrichment by Pacific in failing to pay or credit to the class members the income or interest on the advance payments.

Plaintiffs claim a common law right to interest on the funds deposited in the reserve accounts. 12 CFR §545.6-11(c)

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provides:

> A Federal Association which makes a loan on or after June 16, 1975 on the security of a single-family dwelling occupied or to be occupied by the borrower (except such a loan for which a bona fide commitment was made before that date) shall pay interest on any excrow account maintained in connection with such a loan (1) if there is in effect a specific statutory provision or provisions of the State in which State-chartered savings and loan associations, mutual savings banks and similar institutions are generally required to pay interest on such escrow accounts, and (2) at not less than the rate required to be paid by such State-chartered institutions but not to exceed the rate being paid by the Federal association in its regular accounts (as defined in §526.1 of this chapter). Except as provided by contract, a Federal association shall have no obligation to pay interest on escrow accounts apart from the duties imposed by this paragraph.

Plaintiffs filed this action in 1975, and the members of the class obtained their home loans from Pacific before June 16, 1975. Plaintiffs therefore claim that there was a hiatus in the federal

regulatory scheme in the payment of interest on their reserve accounts and the the common law of Oregon applies. This position was adopted by the Oregon Supreme Court in Derenco, Inc. vs. Benjamin Franklin Savings & Loan Association, 281 Or. 533, 577 P.2d 477 cert. denied, 439 U.S. 1051 (1978). The Court stated that "It is our belief that federal law should not and will not be held to occupy the field to the exclusion of state common law . . . unless Congress or the federal regulatory body unmistakably indicates otherwise." 281 Or. at 548.

In arriving at this conclusion, the Court did not consider an amicus brief submitted by the Federal Home Loan Bank Board, in which the Board argued that federal law alone governed the subject matter of the action.

Almost all aspects of a federal

APPENDIX E

savings and loan associatoin's operations are governed by federal regulations. Meyers v. Beverly Hills Federal Savings and Loan Association, 499 F.2d 1145 (9th Cir., 1974); Rettig v. Arlington Heights Federal Savings and Loan Association, 405 F.Supp. 819 (N.D. Ill., 1975); Elwert v. Pacific First Federal Savings and Loan Association, 138 F.Supp. 395 (D.C. Or. 1956); People v. Coast Federal Savings and Loan Association, 98 F.Supp. 311 (S.D. Cal., 1951).

Federal Savings and Loan Associations were not required to distribute earnings on short-term savings accounts before the promulgation of 12 C.F.R. §541.6. Therefore, even before the promulgation of §545.6-11(c), the payment of interest on reserve accounts, and the right to such interest, was a matter of federal law.

APPENDIX E

For a claim to arise under the laws of the United States, a right or immunity created by the laws of the United States must be an essential element of plaintiffs' cause of action. The right or immunity must be such that it will be supported by one construction of the laws or defeated by another. There must be a genuine and present, and not merely a possible or conjectural controversy, and the controversy must be disclosed upon the face of the complaint, unaided by the answer or petition for removal. Gully vs. First National Bank, 299 U.S. 109, 112-113 (1936).

Pacific contends that plaintiffs' claim will be decided by the interpretation of federal regulations; that the activities of Federal Savings and Loan Associations are regulated by

APPENDIX E

federal law which has preempted state law in the area; and that the gravaman of plaintiffs' complaint rests on rights and immunities created by federal law. I agree.

The need to interpret federal law is apparent on the face of the complaint despite plaintiffs' characterization of the action as one arising under state common law. As such, the case "arises under" federal law and is removable under 28 USC §1337. T.B. Harms Co. vs. Eliscu, 339 F.2d 823 (2nd Cir.) Cert. Denied, 381 U.S. 915 (1965); North Davis Bank vs. First National Bank of Layton, 457 F.2d 820 (10th Cir., 1972).

Plaintiffs assert that even if the action is "arising under" federal law, the magistrate's findings and recommendation must be rejected, because

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in its petition for removal, Pacific relied on sections 1331 and 1332 of Title 28 and did not cite section 1337. Plaintiffs therefore contend that Pacific should be precluded from asserting jurisdiction under section 1337 because it failed to rely on that section in its petition for removal.

In its petition for removal, Pacific alleged that the action "is a civil action arising under the laws of the United States including 12 CFR 546.6-11". That regulation was adopted by the Home Loan Bank Board under authority granted by the Home Owner's Loan Act of 1933 (HOLA), 12 USC §1464 et seq. HOLA has been held to be an Act regulatin commerce for purposes of federal question jurisdiction under §1337. Milberg vs. Lawrence Cedarhurst Federal Savings & Loan Ass'n.,

APPENDIX E

496 F.2d 523 (2nd Cir., 1974); Gibson vs. First Federal Savings & Loan, 504 F.2d 826 (6th Cir., 1974). Although Pacific did not specifically cite §1337 in its petition for removal, the failure to do so is at most a technical non-fatal defect. Harlem River Produce Co. vs. Aetna Cas. & Insurance Co., 257 F.Supp. 160, 164 (S.D.N.Y., 1965). The defective allegation was not so lacking in substance as to defeat removal or preclude Pacific from relying on federal question jurisdiction under §1337. Barrow Development Co. Vs. Fulton Ins. Co., 418 F.2d 316 (9th Cir., 1969).

The objections to the finding and recommendation of the Magistrate are rejected and plaintiffs' motion to remand

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is denied.

DATED this 12th day of December, 1979.

/s/ Gus J. Solomon
JUDGE

The following paragraph added by order of interlineation dated January 25, 1980 by Judge Gus J. Solomon.

The issue here involves a controlling question of law as to which there is substantial ground for difference of opinion, and an immediate appeal from the order denying remand may materially advance the ultimate termination of the litigation.

APPENDIX F

12 CFR 545.6-11

Each loan shall be evidenced by note, bond, or other instrument and shall be secured by such security instruments as is in keeping with sound lending practices in the locality. The loan contract shall provide for full protection to the Federal association and shall be recorded; it shall provide specifically for full protection with respect to insurance, taxes, assessments, other governmental levies, maintenance, and repairs, and it may provide for such other protection as may be lawful or appropriate. Such Federal associations may pay taxes, assessments, insurance premiums, and other similar charges for the protection of its interest in the property on which it has loans; all such payments may, when lawful, be added to the unpaid balance of the loan. A Federal association may require life insurance to be assigned to it by its

APPENDIX F

borrowers as additional collateral for loans on the security of real estate; such association may advance premiums on any such life insurance and, when lawful, may add the premium so advanced to the unpaid balance of the loan. A Federal association may requre that the equivalent of one-twelfth of the estimated annual taxes, assessments, insurance premiums, and other charges on real estate security, or any of them, be paid in advance to such association in addition to interest and principal payments on its loans, to enable the association to pay such charges as they become due from the funds so received. A Federal association shall keep a record of the status of taxes, assessments, insurance premiums, and other charges on all real estate on which such association has loans or which is owned by it. All loan instruments shall comply with applicable provisions of law, governmental

APPENDIX F

regulations, and the Federal Association's charter.

12 CFR 541.5

[A "short-term savings account" is a] savings account in a Federal association established for the purpose of accumulating funds to pay taxes or insurance premiums, or both, in connection with a loan on the security of a lien on real estate.

12 CFR 544.1(b) (10):

Provided, that the association is not required to distribute earnings on short term savings accounts . . . .

APPENDIX G

§1337. Commerce and antitrust regulations; amount in controversy, costs.

(a) The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies: Provided, however, that the district courts shall have original jurisdiction of any action brought under section 20(11) of part I of the Interstate Commerce Act (49 U.S.C. 20(11)) or section 219 of part II of such Act (49 U.S.C. 319), only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interest and costs.

(b) Except when express provision therefore is otherwise made in a statute of the United States, where a plaintiff who files the case under section 20(11) of part I of the Interstate Commerce Act

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(49 U.S.C. 20(11)) or Section 219 of part II of such Act (47 U.S.C. 319), originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of any interest and costs, district court may deny costs to the plaintiff, and in addition, may impose costs on the plaintiff.

(As amended Oct. 20, 1978, Pub.L. 95-486, §9(a), 92 Stat. 1633.)

APPENDIX H

Article VI, Constitution of the United States:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

APPENDIX I

Ch. 64, §5(a), 48 Stat. 132, 12 U.S.C. §1464(a):

"In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as 'Federal Savings and Loan Associations', and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institution in the United States."

Opposition

Office - Supreme Court, U.S.
FILED
FEB 25 1982
ALEXANDER

No. 81-1386

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1981

PACIFIC FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION, a federal savings and loan association,

Petitioner,

v.

CHARLES B. GUINASSO and ROSARIA V. GUINASSO, husband and wife,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

When an action based exclusively on state common law is removed to federal court, is it proper for that federal court to consider more than the allegations contained in a well-pleaded complaint in determining whether removal jurisdiction exists?

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No. 81-1386

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1981

PACIFIC FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION, a federal savings and loan association,

Petitioner,

v.

CHARLES B. GUINASSO and ROSARIA V. GUINASSO, husband and wife,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

STATUTE INVOLVED

The statute involved in this case is 62 Stat. 937, 28 U.S.C. § 1441, which provides in relevant part:

> "(a) Except as otherwise expressly provided by Act of Congress, any civil action

> brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.
>
> "(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. * * *"

STATEMENT OF THE CASE

The Court of Appeals for the Ninth Circuit fairly states the case in its opinion at 656 F.2d 1364, 1365:[1/]

[1/] Footnoted portions of the Opinion have been inserted into the text and are enclosed by brackets. Additions to or corrections of the text made by the Respondents are enclosed by parentheses and underlined.

"The Guinassos assumed a home loan financed by Pacific First Federal Savings and Loan Association. [Pacific is a federally-chartered savings and loan association under the Home Owners Loan Act, 12 U.S.C. § 1461 et seq.] Pursuant to a regulation promulgated by the Federal Home Loan Bank Board, 12 C.F.R. § 545.6-11 (1975), Pacific created escrow accounts with funds collected from mortgagors for taxes and insurance. When the Guinassos' deed of trust was executed, the regulation did not state whether associations were required to pay interest on such accounts. [The regulation was later amended to provide that relevant state laws would determine whether interest was required. See 12 C.F.R. § 545.6-11(c) (1975). This suit (seeks recovery for a period of time prior to the effective date of) the amendment.] Pacific paid none.

"This suit is a class action by the Guinassos for themselves and others similarly situated to recover interest on the funds held in escrow (or the income earned on such funds). The complaint was for breach of contract, violation of duties as a trustee, and unjust enrichment. It was filed in state court and phrased wholly in terms of state law. It presented a recognized cause of action under the common law of Oregon (which the Oregon Supreme Court has

> determined is not preempted by federal law). See Derenco, Inc. v. Benjamin [sic] Franklin Federal Savings & Loan Ass'n, 281 Or. 533, 577 P.2d 477, 491, cert. denied, 439 U.S. 1051, 99 S.Ct. 733, 58 L.Ed.2d 712 (1978).
>
> "Pacific removed the action to federal district court, arguing that federal law preempted the Oregon claim. The district court held that it had jurisdiction under 28 U.S.C. § 1337, [footnote omitted] and it agreed that the state claim was preempted. After denying the plaintiffs' motion to remand, it certified the case for interlocutory appeal under 28 U.S.C. § 1292(b). We granted leave to appeal."

After giving this appeal expedited consideration to protect against the loss of potential class members, the Court of Appeals reversed the District Court and held that removal jurisdiction did not exist.

REASONS FOR DENYING THE WRIT

1. As Respondents Relied Exclusively on State Law in their Well-Pleaded Complaint, The Result Below was Mandated by This Court's Decision in Pan American Petroleum Corp. v. Superior Court.

The Petition for Writ of Certiorari (hereafter, Petition) asserts that this case presents the question whether "federal law and regulations have preempted the field of the lending practices of federal savings and loan associations." Petition, i. This is fallacious.

This Court's decision in Pan American Petroleum Corp. v. Superior Court, 366 U.S. 656 (1961), rejected an argument identical in structure to that made by this Petitioner. Consequently, Pan American required the Court of Appeals to decide this removal jurisdiction case simply by analyzing the allegations made in Respondents' complaint without con-

sidering the Petitioner's assertion of federal preemption.

In Pan American, defendants in Delaware state court actions urged in this Court that state court complaints alleging state law claims necessarily had to be construed as seeking either "to enforce a filed rate [for natural gas sold wholesale in interstate commerce] or to challenge a filed rate." Id. at 662. Under either assumption, the federal courts would have had exclusive jurisdiction. Id.

This Court, however, refused to look beyond the face of the complaints to evaluate the "ultimate substantive issues of federal law" that might be presented. Rather, this Court held that, in deciding jurisdiction, the particular claims alleged in a complaint are dispositive. Id.

It was irrelevant that there existed a "scheme of federal regulation" related to the subject matter of the suit because the plaintiff's allegations, "not the ultimate validity of its arguments, [are] decisive" for jurisdictional purposes. Id. at 663-664. As the suits in Pan American were "based upon claims of right arising under state, not federal, law," this Court concluded that they were within the jurisdiction of the state court. Id. at 662-663.

The analytical approach employed by the Court of Appeals in this case precisely parallels that of Pan American.2/ The Court of Appeals scrutinized Respon-

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2/ Although the Court of Appeals did not expressly rely upon Pan American, it based its holding in part on State of Washington v. American League of Professional Baseball Clubs, 460 F.2d 654 (9th Cir. 1972), a case which explicitly follows Pan American.

dents' complaint and determined that it was "phrased wholly in terms of state law ... [and] presented a recognized cause of action under the common law of Oregon." 656 F.2d at 1365, App. A to Petition at 24.3/ The Court of Appeals thus concluded that "federal law provides neither the right asserted nor the remedy sought" by Respondents. 656 F.2d at 1367, App. A

3/ In Derenco, supra, 281 Or. at 548-549, 577 P.2d at 487-488, the Oregon Supreme Court held that claims identical to those in Respondents' complaint stated a valid cause of action under state, not federal, common law and that such claims were not preempted by federal law. This Court denied certiorari, 439 U.S. 1051 (1978), after inviting and receiving a brief from the Solicitor General expressing the view of the United States, 439 U.S. 814 (1978).

The Court of Appeals was required to accept the Oregon Supreme Court's determination that Respondents had pleaded a valid state law claim for relief. Otherwise, the Court of Appeals would have had to review the merits of the Derenco decision on pre-emption, an act beyond its power, in determining removal jurisdiction.

to Petition at 31. It followed that the "suit did not arise under federal law or an act of Congress regulating commerce" and that "[t]he district court lacked jurisdiction." 656 F.2d at 1367, App. A to Petition at 36-37.

In short, the Court of Appeals, precisely in accordance with the principles set forth in Pan American, held that Petitioner's assertions of federal preemption were irrelevant in determining removal jurisdiction. As the Court of Appeals clearly adhered to the controlling standards established by this Court, there is no reason to review its decision.

2. There is no Conflict of Decision Among the Courts of Appeals.

Contrary to Petitioner's assertions, the opinion below is entirely consistent with the resolution of similar jurisdic-

tional questions by other Courts of Appeals. In an effort to manufacture a conflict, Petitioner ignores existing case law and cites clearly inapposite decisions.

Petitioner's lack of candor with this Court is most apparent in its assertion of a conflict between the opinion below and the Tenth Circuit's decision in North Davis Bank v. First National Bank, 457 F.2d 820 (10th Cir. 1972). Petitioner fails to advise the Court that the Tenth Circuit expressly distinguished North Davis in Madsen v. Prudential Federal Savings & Loan Association, 635 F.2d 797 (10th Cir. 1980), cert. den., -- U.S. --, 101 S.Ct. 3007 (1981), a case which follows Pan American and is entirely consistent with the decision below.

Like the present case, Madsen was originally brought in state court on a state law theory to recover profits a lender had earned through the investment of tax and insurance reserves. The Madsen court, in finding that removal jurisdiction did not exist, held at 801:

> "* * *[E]ven if federal preemption were established, it would not confer jurisdiction when it is raised by the defendant to defeat a common-law contract claim brought in state court. See Pan American Petroleum, 366 U.S. at 662-65; [other citations omitted]."

Madsen distinguished North Davis on the grounds that a central ingredient of the state law claim for relief in North Davis (i.e. whether the defendant had constructed a branch), by virtue of this this Court's prior decision in First National Bank v. Dickinson, 396 U.S. 122, 133 (1969), necessarily presented a ques-

tion of federal law.[4] Madsen, supra at 801. By contrast, the meaning of federal regulations, being "absolutely irrelevant to the Madsens' theory of recovery . . . [b]ecause the Madsens have predicated their suit upon rights created under state law," id., could not give rise to removal jurisdiction. Hence, the Tenth Circuit's decision in Madsen is completely in accord with the holding of this case.[5]

The Second Circuit decisions relied upon by Petitioner are clearly inapposite. The plaintiffs in Murphy v. Colonial

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[4] The Opinion below contains dicta, 656 F.2d at 1367, App. A at 32-34, consistent with the holding in North Davis.

[5] The opinion below is similarly in harmony with the Eighth Circuit's decisions in Home Federal Savings & Loan Association v. Insurance Department of Iowa, 571 F.2d 423 (8th Cir. 1978) and First National Bank v. Aberdeen National Bank, 627 F.2d 843 (8th Cir. 1980).

Federal Savings & Loan Association, 388 F.2d 609 (2d Cir. 1967), and Milberg v. Lawrence Cedarhurst Federal Savings & Loan Association, 496 F.2d 523 (2d Cir. 1974), filed their actions in federal court and attempted to base their complaints on federal law. Consequently, these decisions have no relevance for a case relying exclusively on state law which is removed to federal court. T. B. Harms Co. v. Eliscu, 339 F.2d 823, 827 (2d Cir. 1964), cert. den., 381 U.S. 915 (1965), elaborates upon another doctrine irrelevant to the holding of this case, that a plaintiff can create federal jurisdiction over a state law claim by alleging, as an essential ingredient of that claim, a question phrased in terms of federal law.

3. This Case Presents no Important Unsettled Issue of Federal Law.

Unlike Fidelity Federal Savings & Loan Association v. de la Cuesta, No. 81-750, prob. juris. noted, -- U.S. --, 50 LW 3591 (Jan. 25, 1982), review of this case would not help further define the law applicable to federal savings and loan associations. As previously discussed, Pan American establishes that a court determining removal jurisdiction must focus on the allegations made by a plaintiff, not on whether state law theories asserted in a complaint ultimately can stand in the face of federal law.6/ Hence, the preemption issue is totally irrelevant to the question properly

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6/ Nor would it be appropriate to reconsider the holding in Pan American. Not only does Pan American rest on principles of comity, supra, 8 n.3, but it furthers judicial economy. Since preemption anal-

presented by this Petition.

As for Petitioner's contention that the "* * * Ninth Circuit's ruling encourages disruption of the uniformity intended by Congress" (Petition, 8), it suffices to say that Pan American, 366 U.S. at 665, clearly holds that uniformity considerations cannot expand the scope of a jurisdictional statute.7/

6/ Cont'd.
ysis often involves a "microscopic focus," First Federal Savings & Loan Association v. Peterson, 516 F. Supp 732, 741 (N.D. Fla. 1981), Pan American reduces the work of federal courts in determining removal jurisdiction.

7/ In any event, the Federal Courts of Appeals agree that state common law establishes many of the rights and duties of a federal savings and loan association vis-a-vis its borrowers. See Gulf Federal Savings & Loan Association v. Federal Home Loan Bank Board, 651 F.2d 259, 266 (5th Cir. 1981); Gibson v. First Federal Savings & Loan Association, 504 F.2d 826, 830-831 (6th Cir. 1974); Goldman v. First Federal Savings & Loan Association, 518 F.2d 1247, 1252-1253 (7th Cir. 1975). Cf. Madsen, supra at 802-803. In accord with these decisions is Derenco, supra.

CONCLUSION

It is clear from the foregoing that there is no basis for the issuance of a writ of certiorari in this case, suggesting that Petitioner's motivations in filing its petition is simply to delay the resolution of this case by the Oregon state courts. It is therefore respectfully submitted that this petition for writ of certiorari should be expeditiously denied.

Respectfully Submitted,

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Counsel for Respondents

DATED: February 23, 1982.

Petitioner's Reply Brief

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No. 81-1386

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1981

PACIFIC FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION, a federal savings and loan association,

Petitioner,

v.

CHARLES B. GUINASSO and ROSARIA V. GUINASSO, husband and wife,

Respondents.

PETITIONER'S REPLY BRIEF

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The relationship between federal law and state law with respect to federal savings and loan associations urgently requires clarifying definition by this Court. There is a divergence of authority not only with respect to the jurisdiction of federal courts in this area, compare Fristoe v. Reynolds Metal Co., 615 F2d 1209 (9 Cir. 1980) and North Davis Bank v. First National Bank, 457 F2d 820 (10 Cir. 1972) with Madsen v. Prudential Federal Savings and Loan Ass'n, 635 F2d 797 (10 Cir. 1980), cert. den. 101 S.Ct. 3007 (1981) and Home Federal Savings and Loan Ass'n v. Insurance Dept. of Iowa, 571 F2d 423 (8 Cir. 1978), but also with respect to the applicable law. Compare Panko v. Pan American Federal Savings and Loan Ass'n, 119 Cal. App. 3d 916, 174 Cal Rptr 240 (1981) (appeal filed November 13, 1981), 50 LW 3519, No. 81-922 and Fidelity Federal Savings and Loan Ass'n v. de la Cuesta, No. 81-750, prob. juris. noted, ____ U.S. ____, 50 LW 3585

(January 25, 1982) with Northwestern Federal Savings and Loan Ass'n v. Ternes, ___ N.D. ___, ___ N.W. 2d ___ (January 25, 1982).

Respondents dispute the federal nature of their claim, citing Pan American Petroleum Corp. v. Superior Court, 366 US 656 (1961). That case presented an entirely different issue, however, than that presented in the present case. "The sole question is whether the state courts had jurisdiction." 366 US at 657. Petitioner does not dispute the presence of concurrent jurisdiction but asserts its right to have the case heard in a federal forum pursuant to the removal statute.

This Court's holding in Gully v. First National Bank, 299 U.S. 109 (1936) articulates the specific criteria for determining the existence of a federal question for purposes of removal.

> To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must

> be an element and an essential one, of the plaintiff's cause of action. * * * The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. * * * A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto * * *, and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal.

299 U.S. at 112-13.

That case involved a situation where federal law permitted the state to enact legislation taxing shares in national banks. In the present case, the federal law limits the operation of state law, yet the Ninth Circuit nonetheless relied on Gully v. First National Bank, 299 U.S. 109 (1936). Its significance as the final word on removal of federal question cases is considerable, yet the standards articulated in this important case have been called "troublesome and difficult to apply". 14 Wright and Miller, Federal

Practice and Procedure §3772, p. 555 (1976). The importance of this frequently cited case demands a proper application, or at least a confirming re-examination, of its holding in view of the facts of the present case.

It is clearly the gravamen of respondents' claim that petitioner is obligated to pay interest or earnings on certain reserve accounts. Petitioner's duty with respect to those accounts, however, can only be determined by consideration of the applicable regulations. See Petition, Appendix F. This is the essential element of respondents' claim, which has its source in federal statutes and regulations, and directly involves federal law. Petitioner's federal nature as a federal savings and loan association is apparent on the face of the complaint.

Since the respondents' allegations raise the issue of rights and duties arising from federal law, the case was properly removed applying the criteria

of Gully v. First National Bank, 299 U.S. 109 (1936). North Davis Bank v. First National Bank, 457 F2d 820, 823 (10 Cir. 1972); Rettig v. Arlington Heights Federal Savings and Loan Ass'n, 405 F.Supp 819, 823 (N.D. Ill. 1975).

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit conflicts in both its reasoning and its holding with federal court decisions. The decision below seriously impairs the uniform federal regulation of federal savings and loan associations. Furthermore, review by this Court is important to assure the availability of a federal forum for litigation involving preemptive federal law.

The petition for writ of certiorari should be granted.

Respectfully submitted,

WOOD, TATUM, MOSSER, BROOKE
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By _____
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